Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1993

DR. BORIS LIPOVSKY,

Petitioner,

v.

ZACHARY CARTER, Individually and as United States Attorney for the Eastern District of New York,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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31pp

QUESTIONS PRESENTED

1. Should the interpretation and enforcement of plea agreements in criminal cases be governed by traditional principles of contract law?

2. Should the Government be required to abide by its unconditional written promise under a plea agreement not to prosecute petitioner further, where petitioner waived indictment, entered a plea of guilty and served the sentence imposed, notwithstanding the fact that the conviction was constitutionally invalid as a result of the failure of the Court to require an admission of criminal intent as part of the guilty plea?

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DR. BORIS LIPOVSKY,

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Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Dr. Boris Lipovsky petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit affirming the Judgment of the United States District Court for the Eastern District of New York dismissing his complaint for a declaratory judgment.

OPINION BELOW

The opinions of the Court of Appeals (Pet. App. A-1) and the District Court (Pet. App. A-5) are unreported.

JURISDICTION

The Judgment of the Court of Appeals was entered on December 10, 1993. The jurisdiction of this Court is invoked

under 28 U.S.C. § 1254(1). Jurisdiction in the District Court was based on 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

42 U.S.C. § 1320a-7b(b)(1)(B) provides as follows:

> "(b) Illegal remunerations
>
> (1) whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--
>
> ---
>
> (B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under subchapter XVIII of the chapter or a State health care program,
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both."

Rule 11(c) and (d), Fed. R. Crim. P., provide as follows:

"(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense; and

(2) if the defendant is not represented by an an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, one will be appointed to represent the defendant; and

(3) that the defendant has the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury and at that trial the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses, and the right against compelled self-incrimination; and

(4) that if a plea of guilty or nolo contendere is accepted by the court there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(5) if the court intends to question the defendant under oath, on the record, and in the presence of counsel about the offense to which the defendant has pleaded, that the defendant's answers may later be used against the defendant in a prosecution for perjury or false statement."

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or the defendant's attorney."

STATEMENT

This case raises difficult and important issues concerning the extent to which common law principles of contract law govern the interpretation and enforcement of plea agreements in criminal cases. The following is a brief summary of the factual background of this case.

1. Petitioner is a licensed physician who immigrated to the United States from Russia in 1979. Petitioner was arrested on November 21, 1989 for allegedly violating 42 U.S.C. § 1320(a)-7b(b)(1)(B) by knowingly and wilfully accepting remuneration for ordering an item reimbursable under the Medicaid program.

On December 14, 1989, petitioner acceded to a written plea agreement with the United States Attorney's Office for the Eastern District of New York. The plea agreement, which was essentially a contract of adhesion drafted by the Government, provided that if petitioner waived indictment and entered a plea of guilty to one count of violating Section 1320(a)-7b(b)(1)(B), the government would not "further prosecute" petitioner for any crimes based on

his dealings with the company that had been the subject of the arrest warrant. The written agreement also stated that "[T]here are no additional promises, agreements or conditions other than those set forth" in the written agreement.

2. On February 26, 1990, petitioner entered a plea of guilty as called for by the plea agreement. During the factual allocution that was conducted pursuant to Fed.R.C m.P. 11, however, it became apparent that there was no factual basis for petitioner's plea. Petitioner explained that he had accepted remuneration ($100) for instructing patients in the use of a device reimbursable under the Medicaid program, but that he had not accepted the $100 payment as a *quid pro quo* for ordering the device. Petitioner also stated that he did not understand at the time he received the payment that it was illegal to do so, although he had been told as of the time of the plea that it was illegal.[1]

Notwithstanding the fact that petitioner did not allocute to the essential elements of wilfulness and criminal intent, the Government misadvised the Court that a sufficient plea allocution had been made. The Court accepted petitioner's guilty plea and a judgment of conviction was entered thereupon. Petitioner was placed on probation for three years and fined $5,000. Petitioner was also placed on probation for one year by State licensing authorities and ordered to perform fifty hours of community service. Petitioner has completed service of his sentence.

3. After petitioner's judgment of conviction was entered, the defects in the plea allocution were brought to the attention of the Government. The Government advised petitioner's counsel that if petitioner took any steps to vacate his conviction by filing a petition for habeas corpus or coram nobis, the Government would rescind the plea agreement and treat its obligations under the agreement as null and void, and would prosecute petitioner on all additional charges that would otherwise be barred by the plea agreement.

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[1] The text of the relevant portions of the guilty plea allocution is reprinted at Pet. App. A10.

Petitioner commenced this action seeking a declaratory judgment that the Government's threat to bring additional charges against petitioner violated the plain language of the plea agreement. The District Court dismissed petitioner's action, holding both that petitioner's plea allocution was sufficient under Rule 11, and that even if it were not, the plea agreement would not prohibit the Government from pursuing the threatened additional charges against petitioner. (Pet. App. A-8) The Court of Appeals affirmed, but did not address the issue of the sufficiency of petitioner's plea allocution under Rule 11. The Court of Appeals simply concluded that if petitioner were to seek to overturn his conviction, the Government would be relieved of its obligations under the plea agreement and would be free to bring additional charges against petitioner. (Pet. App. A-4)

REASONS FOR GRANTING THE PETITION

The Court should grant the petition and review this case because it presents an issue of paramount importance to the proper functioning of the federal criminal justice system. The issue in this case is whether plea agreements should be interpreted and enforced in accordance with settled principles of contract law, as petitioner contends, or whether plea agreements should be governed by vague and uncertain principles that do not correspond to traditional understandings of contract law, as the Court of Appeals held. These issues are of considerable public importance and have been the subject of conflicting and varying decisions by lower courts, and accordingly, are appropriate for review by this Court.

I. BECAUSE PLEA AGREEMENTS ARE INCREASINGLY IMPORTANT TO THE FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM, IT IS VITAL THAT THEY BE CONSTRUED UNDER RELIABLE AND PREDICTABLE RULES OF CONTRACT LAW.

The plea agreement has evolved from something that was unheard of in the operation of the criminal justice system, to an indispensable tool that exists in the vast majority of criminal cases. Indeed, in earlier years, federal prosecutors were expressly forbidden to enter into plea agreements.[2]

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[2] To lend some historical perspective to this evolution, the following is an excerpt from the 1935 United States Attorney's Manual, which unequivocally forbade federal prosecutors from entering into plea agreements:

> "**Recommendations as to Sentence.** No assistant is authorized under any circumstances, to make any representation or statement as to what the Government's recommendation will be:
>
> a. As to sentence after a plea or conviction;
> b. As to the disposition of the remaining counts following a plea of guilty to certain counts only; or
> c. As to the disposition of the case against the defendant in the event of a plea by a codefendant.
>
> There are no exceptions to this rule. Indictments are obtained with the expectation that they will result in actual trials and not in pleas of guilty. Assistants, in presenting facts to the grand jury, must leave outof consideration the possibility of a plea of guilty.
>
> Any statement by defense counsel to the court at the time of sentence to the effect that the Government had indicated to him in advance its views on the question of sentence, should be promptly and vigorously denied."

In more recent years, the courts have recognized that plea agreements are an acceptable, and, in light of the burgeoning caseload the courts face in criminal matters, an indispensable part of the functioning of the criminal justice system. Indeed, under the current regime of the sentencing guidelines, the importance of plea agreements has become even more significant. The vast majority of federal criminal cases are now disposed of by guilty pleas, and often, the most critical phase of the case is the negotiation of the plea agreement that will determine the nature of the offense of which the defendant is convicted, and hence, under the sentencing guidelines, the sentence the defendant will receive.

A major step forward in the modern recognition of the legitimate role of the plea agreement occurred in this Court's decision in *Santobello v. New York*, 404 U.S. 257 (1971), in which this Court held that plea agreements were entitled to judicial enforcement. In *Santobello*, this Court applied traditional contract law principles to the interpretation and enforcement of a plea agreement. Since *Santobello*, several lower courts have held that plea agreements should be governed by traditional contract law principles. *See, e.g., United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990); *Government of the Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3rd Cir. 1980). Indeed, commentators have denominated this growing body of law "criminal contract law". Morvillo, *Criminal Contract Law*, N.Y. Law Journal, Oct. 6, 1992.

There are numerous important advantages to having plea agreements governed by traditional contract law principles. The most significant of these advantages is that of predictability. The common law of contracts has evolved over hundreds of years and has given rise to a body of law that is unparalleled in its breadth, sophistication, and complexity. There are few issues that can arise in the interpretation or enforcement of contracts that are not addressed in the vast body of traditional contract law.

Since the functioning of the criminal justice system has come to rely so heavily on plea agreements, it is essential for there to be a readily available body of law to which litigants and practitioners,

representing both the Government and the defense, can look to resolve questions that inevitably arise concerning the enforcement and interpretation of plea agreements, so that courts can protect "the substantial constitutional interests implicated by plea agreements." *Innes v. Dalsheim*, 864 F.2d 974, 979 (2d Cir.1988). Traditional principles of contract law provides such a body of law.

Notwithstanding the foregoing considerations, some lower courts, including the Second Circuit, have held that contract law principles do not necessarily apply to the interpretation and enforcement of plea agreements. For example, in *United States v. Salcido-Contreras*, 990 F.2d 51, 52 (2d Cir. 1993), the Second Circuit held that while principles of contract law are pertinent to the interpretation of plea agreements, the overriding considerations must be based on "the interests of justice." Similarly, as discussed in Point II, below, the decision below cannot be reconciled with a strict application of contract law principles.

The issue of whether or not plea agreements are governed by contract law principles is an issue that this Court should review. In view of the overriding importance of plea agreements in the functioning of the criminal justice system, it is imperative that there be clear rules governing such agreements. This Court should grant the petition in order to resolve the uncertainty that exists in the lower courts as to the extent to which plea agreements are governed by traditional contract law principles.

II. UNDER TRADITIONAL CONTRACT LAW PRINCIPLES, PETITIONER WAS ENTITLED TO DECLARATORY RELIEF UNDER THE PLEA AGREEMENT.

This case presents an excellent opportunity for this Court to address the applicability of contract law principles to plea agreements. Under traditional contract law, petitioner is entitled to relief, and the lower court's rejection of petitioner's position can only be based on the conclusion that contract law is inapplicable.

Two points must be emphasized that make this case particularly important for this Court's review. First, a defendant's rights under Rule 11 are of constitutional dimensions and must be zealously protected by the Courts. *United States v. Timmreck*, 441 U.S. 780, 785 (1979). Second, petitioner in this case actually served the sentence imposed on him as a result of the erroneous conviction, and it is manifestly unfair to permit the Government to rescind the plea agreement in order to permit the government to subject petitioner to further prosecution.

The plea agreement in this case is a classic example of a unilateral contract, *i.e.*, a contract involving an exchange of performance of an act by one party for a promise of future performance by the other party. The plea agreement provided that if petitioner performed an act, *i.e.*, if petitioner waived indictment and entered a plea of guilty, in exchange, the government would abide by a promise, *i.e.*, a promise not to prosecute petitioner any further. Since petitioner has performed the act called for by the plea agreement, *i.e.*, he waived indictment, entered a plea of guilty, and served the sentence imposed thereupon, the Government must adhere to its promise not to prosecute him further. Contract law establishes that petitioner is entitled to declaratory relief directing the Government to keep its promise.

The court below apparently proceeded on the assumption that the plea agreement also included either an implied promise by the petitioner or an implied condition subsequent that the petitioner would refrain from taking any steps to vacate the judgment of conviction that was entered as a result of the invalid plea allocution. The plea agreement, however, contains neither such a promise by the petitioner nor such an implied condition subsequent; on the contrary, the plea agreement expressly states that there are no promises, conditions, or agreements other than those set forth in the written document. Thus, purely as a matter of contract law, the decision below is contrary to the plain terms of the written plea agreement and is therefore incorrect.

Under contract law, the only basis on which the Government could be relieved of its promise not to prosecute petitioner further,

would be on the basis of a finding that the Government is entitled to rescission of the plea agreement. The court below, however, did not address the issue of rescission.

Moreover, under the facts of this case, rescission is not an appropriate remedy for the Government to be granted. If petitioner is ultimately entitled to have the judgment of conviction vacated, it is because the plea allocution was conducted in violation of Fed.R.Crim.P. 11, in that petitioner did not allocute to the essential elements of criminal intent and wilfulness. The obligation to see that the plea allocution complied with Rule 11 lay with the Government and the District Court, not with the petitioner. *United States v. Rossillo*, 853 F.2d 1062, 1067 (2d Cir. 1988). It is plainly inequitable to permit the Government to obtain the relief of rescission of the plea agreement based on its own failure to comply with Rule 11 in conducting the plea allocution. Again, traditional rules of contract law dictate that the Government must be denied the remedy of rescission under circumstances such as these. 17A Am. Jur. 2d, "Contracts" § 573 ("a party seeking to rescind must show that he was free from default in relation to the obligation which he claims the other party failed to perform").

Under analogous situations, other lower courts have denied the Government the relief of rescission of a plea agreement where the Government itself was not free from fault. For example, in *United States v. San Pedro*, 781 F.Supp. 761 (S.D. Fla. 1991), the Government sought to rescind a plea agreement because the defendant allegedly failed to provide complete cooperation with the Government. The court in *San Pedro* looked to traditional contract law principles to determine if the remedy of rescission was available to the Government, and concluded that since the Government bore responsibility for the fact that the defendant had not had an opportunity to provide full cooperation, the Government was not entitled to rescission of the plea agreement. 781 F.Supp. at 774-775.

A traditional contract law approach was also taken to the issue of rescission of a plea agreement in *United States v. Brown*, 763

F.Supp. 1518 (D. Ariz. 1991), *aff'd*, 979 F.2d 1380 (9th Cir. 1992). As in *San Pedro*, the court in *Brown* held that the Government could not rely on its own deficiencies in performance as the basis for rescinding its obligations under the plea agreement. 763 F.Supp. at 1528.

In this case, the Court of Appeals took a very different approach from that followed in *Brown* and *San Pedro*. The Court of Appeals tacitly gave the Government the benefits of the equitable remedy of rescission of the plea agreement, but did not analyze any of the equitable factors to which courts traditionally look -- and which the courts applied in *Brown* and *San Pedro* -- in determining whether or not a party is entitled to the remedy of rescission. Since the Government must bear responsibility for the fact that the plea allocution in this case did not comport with Rule 11, the Government plainly is not entitled to the equitable remedy of rescission.

Indeed, recent decisions of this Court emphasize the significance of the Government's failure to discharge its obligations in this case to see that a proper guilty plea allocution took place as required by Rule 11. The Government erroneously advised the Court that there had been a sufficient plea allocution by petitioner, even though there was no allocution at all as to the essential elements of wilfulness and criminal intent -- on the contrary, petitioner explicitly stated in the allocution that he had not acted with criminal intent. In *Ratzlaf v. United States*, No. 92-1196, 62 U.S.L.W. 4037, 4039 (Jan. 11, 1994), this Court recently cautioned courts and prosecutors not to dispose of the requirement of wilfulness where it is an essential element of a criminal statute:

> "The trial judge in Ratzlaf's case, with the Ninth Circuit's approbation, treated §5322(a)'s 'willfulness' requirement essentially as surplusage -- as words of no consequence. Judges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense."

In conducting petitioner's plea allocution in this case, the Government and the District Court did precisely what this Court condemned in *Ratzlaff* by treating the essential element of wilfulness as surplusage. The Government should not reap a benefit from its own misfeasance by being permitted to use the insufficiency of petitioner's plea allocution as the basis for rescinding its obligations under the plea agreement. Yet, that is precisely what the Government seeks to do and precisely what the courts below approved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 9, 1994
New York, New York

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of December, one thousand nine hundred and ninety-three.

PRESENT: HONORABLE JON O. NEWMAN,

Chief Judge.
HONORABLE JAMES L. OAKES,
HONORABLE RICHARD J. CARDAMONE,

Circuit Judges.

DR. BORIS LIPOVSKY,
Plaintiff-Appellant,

V.

ZACHARY CARTER, INDIVIDUALLY AND AS UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF NEW YORK,
Defendant-Appellee.

93-6143

ORDER

Appeal from the United States District Court for the Eastern District of New York (Eugene H. Nickerson, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Dr. Boris Lipovsky appeals from the judgment entered May 28, 1993, dismissing his action seeking a declaratory judgment stating that, if he successfully moved to vacate his previously-entered guilty plea, the Government would be barred from prosecuting him further on the charges that led to his plea. On appeal, Lipovsky claims that (1) the District Court exceeded its jurisdiction when ruling that his plea was valid, and (2) the District Court erred in holding that neither Lipovsky's plea agreement nor the doctrine of promissory estoppel would preclude his further prosecution if he successfully moved to vacate his plea.

An investigation of illegal practices by doctors showed that, from 1987 through 1989, Lipovsky received illegal kickbacks from Douglas Esposit for ordering breathing equipment for Medicaid patients. In a letter dated December 14, 1989, the Government stated that if Lipovsky pled guilty to one count of violating 42 U.S.C. § 1320a-7b(b)(1)(B), the Government would agree not to prosecute Lipovsky further for any crimes based on his transactions concerning breathing equipment. On February 26, 1990, Lipovsky entered such a plea and was subsequently sentenced to three years of probation, a $5,000 fine, and a $50 special assessment.

In the course of his plea allocution on February 26, 1990, Lipovsky initially seemed to suggest that he had received money from Esposit not for ordering certain equipment but simply for instructing patients concerning how to use this equipment. The District Court then asked the Government to outline its proof. After the Government briefly detailed its proof, the District Court engaged in a brief colloquy with Lipovsky. In this discussion, Lipovsky answered affirmatively when the Court asked whether the $100 payment he received from Esposit was for ordering equipment. After questioning Lipovsky, the District Court asked if the plea allocution was sufficient. The lawyer for the Government stated that he believed the plea allocution was sufficient, and the District court then accepted Lipovsky's plea.

In the fall of 1992, Lipovsky apparently suggested to the Government that he was considering moving to vacate his

conviction on the ground that his plea allocution was insufficient. The Government responded that it would prosecute Lipovsky on charges stemming from his breathing equipment transactions if he successfully overturned his conviction. In turn, Lipovsky brought the present action seeking a declaration that, if he successfully moved to vacate his plea, the Government would be barred from further prosecuting him. The District Court dismissed Lipovsky's action on the Government's cross-motion for summary judgment. After reviewing the record of the plea allocution, the District Court first stated that "there is no basis for vacating the judgment of guilty based on the plea." The District Court further ruled that, even if the plea was invalid, the Government would not be precluded from prosecuting Lipovsky further. The Court reasoned that the Government's promise in the plea agreement not to prosecute contemplated a *valid* plea. Thus, if Lipovsky's conviction was overturned because his plea was invalid, the consideration for the Government's promise was eliminated and thus its "promise would not be binding."

1. Lipovsky first claims that the District Court exceeded its jurisdiction when it ruled that his plea was valid. Lipovsky asserts that the validity of his plea was not an element of his action since he was seeking only a declaration that, in the event that his plea was vacated, the Government could not further prosecute him. The Government responds that Lipovsky made the validity of his plea an issue in his action by specifically alleging, and articulating why, his plea allocution was insufficient. Alternatively, claims the Government, if the District Court in fact did not have jurisdiction to decide the validity of Lipovsky's plea, then Lipovsky's action fails to raise a justiciable case or controversy.

In this context, it is an interesting question whether a party through a declaratory judgment action can properly ask a court to determine the legal consequences that would flow from one particular resolution of a preliminary legal dispute, the outcome of which the court is asked to assume but not decide. We have substantial doubts about the justiciability of such a declaratory judgment action which appears to seek an advisory opinion on a hypothetical question. Yet we also recognize the potential

unfairness of forcing a party to first seek the resolution of the preliminary legal dispute when sever negative legal consequences might flow from that resolution. Because we think Lipovsky's contention on the merits is easily rejected, we think we can and should reach the merits of his ultimate claim by assuming, without deciding, that the controversy is justiciable. *See generally Browning-Ferris Industries v. Muszynski*, 899 F.2d 151, 154-60 (2d Cir. 1990).

2. On the merits, Lipovsky asserts that the plain terms of the plea agreement he executed with the Government would bar his further prosecution even if he successfully moved to vacate his plea and conviction. Lipovsky claims that he satisfied his part of the plea agreement by pleading guilty on February 26, 1990. He thus maintains that the Government must still be held to its promise under the plea agreement to forgo further prosecution of Lipovsky even if the plea is vacated.

Lipovsky's interpretation of the plea agreement borders on the preposterous. Only a *valid* plea was the consideration for the Government's promise to forgo further prosecution. If Lipovsky withdraws his plea, the Government's promise is no longer enforceable.

Lipovsky's alternative argument based on the doctrine of promissory estoppel is equally flawed. The Government did not clearly and unambiguously promised to forgo further prosecution even if the plea was later ruled invalid, nor can Lipovsky reasonably claim that he relied to his detriment on such a promise.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

DR. BORIS LIPOVSKY,

Plaintiff,

-against-

MARY JO WHITE, Individually, and as United States Attorney, Eastern District of New York,

Defendant.

CV 93-0518
MEMORANDUM AND ORDER

----------x

BORIS KOSTELANETZ, ESQ.
New York, New York

-and-

STUART E. ABRAMS, ESQ.
New York, New York

-and-

ERIC BRESLIN, ESQ.
JAMES P. FLYNN, ESQ.
HANNOCH WEISMANN, ESQ.
Roseland, New Jersey

for Plaintiff.

MARY JO WHITE, United States Attorney
(Margaret M. Giordano, Assistant United States Attorney, of counsel)
Brooklyn, New York
for Defendant.

NICKERSON, District Judge

Plaintiff, Dr. Boris Lipovsky, brought this action for declaratory relief pursuant to 28 U.S.C. § 2201. The defendant is the United States Attorney for the Eastern District of New York.

In December 1989 the United States Attorney's Office entered into a plea agreement with Lipovsky permitting him to plea guilty to a felony information charging one count of 42 U.S.C. § 1320a-7b(b)(1)(B). The agreement provided that the count would "charge the defendant with receiving remuneration in exchange for ordering and arranging for the ordering of an item paid for by Medicaid or Medicare."

The agreement also provided that in exchange for defendant's waiver of indictment and plea of guilty "this office will agree not to further prosecute the defendant for any charges that could be brought by this office for crimes committed by the defendant based on his or her dealings" with a seller of breathing equipment.

On February 26, 1990 Lipovsky pleaded guilty before the court to the information charging that he knowingly and willfully solicited and received a kickback in exchange for ordering items payable under the Medicaid program.

Lipovsky's present complaint says that he "did not allocute to the crime charged and therefore no factual basis for the plea existed." A copy of the plea minutes are attached as an exhibit to the complaint.

Thereafter the court sentenced Lipovsky to a term of 3 years probation, a $5000 fine, and a $50.00 special assessment.

Lipovsky says that as the result of the conviction the Board for Professional Medical Conduct for the New York State Department of Health suspended his license to practice medicine for one year, stayed the suspension and placed him on probation for one year on condition that he complete 50 hours of community service. In addition, the Department of Health and Human Services has

excluded Lipovsky from participating in the Medicare and Medicaid programs for a period of 5 years.

The complaint alleges that the United States Attorney has taken the position that if Lipovsky obtains an order vacating his conviction based on the insufficiency of the plea allocution, the United States Attorney will prosecute him for the underlying count of the information plus additional counts arising from his dealings with the seller of breathing equipment.

Lipovsky asks for a declaratory judgment that the plea was invalid and that nonetheless the United States Attorney's Office should be held to the plea agreement and precluded from prosecuting Lipovsky if the conviction is hereafter vacated. He reasons that further prosecution would violate various provisions of the constitution.

Lipovsky now moves for summary judgment, and the United States Attorney cross-moves to dismiss the complaint.

The court finds no merit in Lipovsky's position.

The charge was accurately summarized in the agreement with the United States Attorney, and Lipovsky admitted that he had gone over the charge with his attorney. It is true that at one point in the allocution Lipovsky took the position that he did not take money for ordering the equipment but for instructing patient how to use it. He claimed that such instruction was the "work" of the seller of the equipment.

After Lipovsky took this position the court requested the Assistant United States Attorney to outline the government's proof. The Assistant replied, in substance, that the seller, in the business of providing breathing therapy equipment, had a business relationship with Lipovsky before the seller became a government informant. Under this relationship the seller would provide breathing equipment for patients of Lipovsky who were eligible for Medicaid. In return for a kickback paid by the seller, Lipovsky ordered the equipment from the seller. After the seller became an

informant and while wearing a body recorder while meeting with Lipovsky, he paid a kickback to Lipovsky for arranging to order the equipment for two of Lipovsky's patients whose expenses were reimbursed by Medicaid.

Neither Lipovsky nor his attorney objected to or corrected this description by the United States Attorney.

After the Assistant United States Attorney described the government's proof, the court again questioned Lipovsky. He admitted that he paid money to the seller and answered in the affirmative the following question: "And this was for equipment that you ordered for your patients who have breathing problems?"

The court was fully satisfied that Lipovsky accepted, and admitted having accepted, kickbacks in return for ordering equipment for his patients. In the court's opinion there is no basis for vacating the judgment of guilty based on the plea.

It is noteworthy that neither Lipovsky nor his attorney objected to or corrected the description by the Assistant United States Attorney of what Lipovsky had done. Instead Lipovsky in answer to the court's question admitted he made a payment for ordering equipment for his patients.

Moreover, assuming for the sake of argument that the plea was invalid because there was no factual basis for it, the court holds that there is no reason why the government should not be free to prosecute Lipovsky for any crimes that he committed based on his dealings with the seller of the equipment. The plea agreement plainly contemplated a valid, not an invalid, plea of guilty in exchange for which the United States Attorney's Office agreed not to prosecute Lipovsky further. If the plea had been invalid, the consideration for the promise of the United States Attorney's Office would also have been lacking and the promise would not be binding.

The court need not determine the disputed question of whether there is a "case of controversy".

Lipovsky's motion for summary judgment is denied, and the motion of the United States Attorney is granted. The complaint is dismissed. So ordered.

Dated: Brooklyn, New York
May 25, 1993

Eugene H. Nickerson, U.S.D.J.

EXCERPTS FROM PLEA ALLOCUTION

THE COURT: Tell me what happened, but speak up a little so that I could hear you.

DEFENDANT LIPOVSKY: Okay I will try.

I'm a physician. I have patients, and a patient with bronchial asthma -- a case of severe bronchial asthma, and these people with severe bronchial asthma they need treatment to help them to breathe and I prescribe for them, especially for people with severe bronchial asthma, but unfortunately I accepted the money. But, when I did it, they did it the wrong way. I thought at that time I was allowed to take this money, but it was wrong, and so now I realize that I did it wrong, regretting it.

THE COURT: Well, now, just spell that out for me. This fellow Esposit came and he, I take it, was selling or providing this equipment, breathing equipment?

DEFENDANT LIPOVSKY: Yes. There was a problem. Let me explain into words. Mr. Esposit has to provide -- asked to provide this service, but here he asked me to instruct patients how to use this equipment, and I did not charge the patient for it, and so I thought at the time the --

THE COURT: So, he offered you money if you would order it for these patients?

DEFENDANT LIPOVSKY: Not for ordering it, for instruction, because it's his problem. It's his work to instruct patients how to use this equipment.

THE COURT: What's the government's proof here?

MR. BALL: Judge, the government's proof would be as follow: Mr. Esposit was in the business of providing breathing therapy equipment. At a time prior to Mr. Esposit's becoming a government informant, Mr. Esposit had a business relationship

with Dr. Lipovsky whereby he would provide this breathing equipment for patients of Dr. Lipovsky's, patients who were eligible for Medicaid. In return for Dr. Lipovsky's ordering through Mr. Esposit and arranging to order through Mr. Esposit, for Mr. Esposit to provide this equipment to Dr. Lipovsky's patients, Mr. Esposit would pay a kickback to Dr. Lipovsky. These were patients which ultimately these patients would be reimbursed by Medicaid.

Mr. Esposit because a government informant. While wearing a body recorder while meeting with Dr. Lipovsky, particularly on October 17, 1989 in the Eastern District of New York, in return for Dr. Lipovsky's arranging for Mr. Esposit to provide this equipment for two patients, Mr. Esposit paid Dr. Lipovsky a kickback of $100.00.

THE COURT: Did you pay him $100.00 around this October date?

MR. SEGAL: It's the other way, your Honor. He was being made --

THE COURT: I mean -- excuse me. Did Mr. Esposit pay you $100?

DEFENDANT LIPOVSKY: Yes.

THE COURT: And this was for equipment that you ordered for your patients who have breathing problems?

DEFENDANT LIPOVSKY: Yes, sir.

THE COURT: Okay.

Did you know, by the way, that that was reimbursable under the Medicaid?

DEFENDANT LIPOVSKY: Excuse me?

MR. SEGAL: Did you know that?

DEFENDANT LIPOVSKY: Of course I knew about it.

THE COURT: Is that sufficient?

MR. BALL: I believe it is, Judge.